IN THE

Supreme Court of the United States

OCTOBER 1970 TERM, NO. 301

WEBSTER BIVENS,

Petitioner,

—v.—

SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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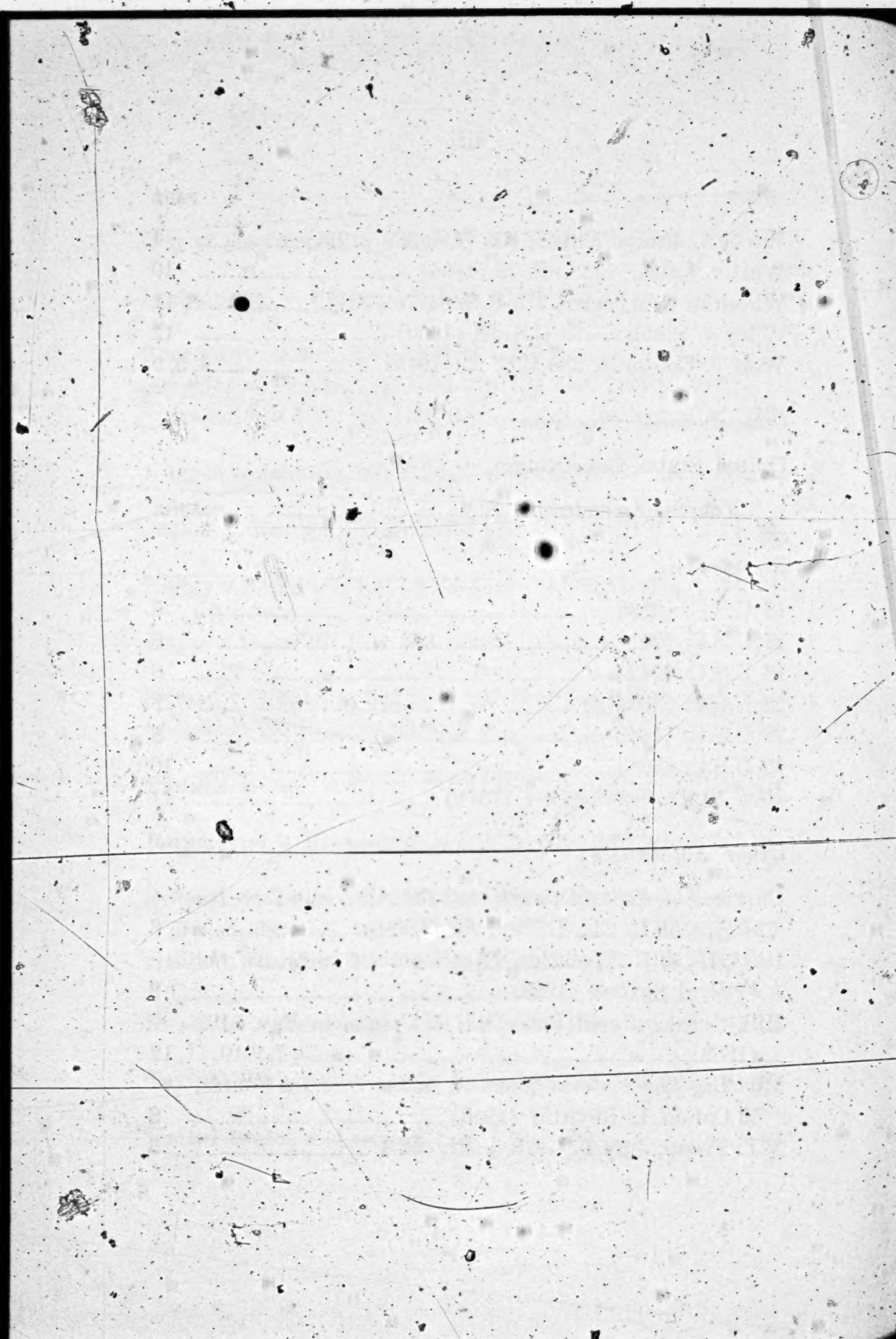

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Interest of Amicus

The American Civil Liberties Union is a nationwide, non-partisan organization whose goal is to safeguard and defend those constitutional liberties guaranteed in the Bill of Rights. Toward that end, the Union has been concerned for fifty years not only with the declaration and definition of constitutional principles but also with the implementation and protection of such constitutional rights, including the rights of personal security and privacy bottomed in the Fourth Amendment.

This case directly raises serious issues about the manner of assuring the availability of the personal liberties afforded by the Fourth Amendment to the United States Constitution. In addition, the resolution of the issues raised in this case may affect the implementation by appropriate remedies of other constitutional safeguards as well. For both reasons, the American Civil Liberties Union views this case as an important one which has wide-reaching consequences in terms of both the continuing vitality of the Fourth Amendment and the accountability of federal officers for their unconstitutional conduct.*

Statement of the Case

A writ of certiorari issued in this case to review the affirmance, by the United States Court of Appeals for the Second Circuit, of the dismissal of the complaint by the United States District Court for the Eastern District of New York. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718 (2d Cir. 1969).

In brief, petitioner complained that the defendants, "acting under the colors and authority of the United States of America" (Complaint, para. 2), conducted a forcible and unreasonable search of petitioner's apartment, and arrested petitioner with neither a search warrant nor an arrest warrant. Petitioner's family observed all of this, and he claimed great humiliation, embarrassment, and mental suffering (Complaint, para. 8) as a consequence of the search and arrest and prayed for damages of $15,000 against each Agent.

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* Letters of consent to the filing of this brief from counsel for petitioner and for respondents are being submitted to the Court.

The district court granted a motion to dismiss for failure to state a claim upon which relief could be granted and for lack of jurisdiction over the subject matter. The Court of Appeals rejected the conclusion that the district court lacked jurisdiction but affirmed for failure to state a claim. In so doing, it held that, in the absence of an Act of Congress additional to that establishing the district court's general federal question jurisdiction, one may not maintain in federal court a claim for money damages as a consequence of deprivation of Fourth Amendment rights by persons acting under federal authority. Having ruled on that ground, the court found it unnecessary to consider the additional claim, raised by the government and accepted by the district court, that the defendants were immune from suit, so as to require dismissal on the face of the complaint.

In holding that "the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure," 409 F.2d at 719, the court below relied on its reading of the history of the Fourth Amendment, its view that a federal damage remedy is not essential to safeguarding Fourth Amendment guarantees, and its belief that judicial economy would not be served by allowing such suits. These rationales have been criticized by at least one noted scholar of judicial federalism. See Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1149-55 (1969).

For the reasons set forth herein, *amicus* submits that this Court should recognize and afford the remedy of a federal damage action to redress brazen violations of the interests protected by the Fourth Amendment.

I.

This Court should affirm the existence of a federal cause of action to remedy by damage a deprivation of rights secured by the Fourth Amendment to the United States Constitution when such deprivation is effected by persons acting under color of federal authority.

It is the view of the American Civil Liberties Union that additional legislation is unnecessary for the maintenance of this action as a purely federal one. Rather, this Court should hold, as it has in the case of injunctive relief, see *Bell* v. *Hood*, 327 U.S. 678, 684, n. 4 (1946), that the right to the remedy of damages for deprivation of the constitutional right stems directly from the provisions of the Fourth Amendment.

A. *Recognising This Type of Damage Action Is Essential to Protecting Fourth Amendment Interests*

The recent history of the Fourth Amendment has been preoccupied with the question of remedies for its breach. The primary controversy has been over whether the remedy of an exclusionary rule, fashioned by "judicial implication," *Wolf* v. *Colorado*, 338 U.S. 25, 28 (1949), and long-applicable in federal criminal prosecutions, see *Weeks* v. *United States*, 232 U.S. 383 (1914), was sufficiently important to the scheme of the Fourth Amendment so as to require its application to state prosecutions as well.

The ultimate resolution of this constitutional dispute turned in large part on this Court's altered view of the viability of other remedies for safeguarding Fourth Amendment rights against official lawlessness. The ma-

jority opinion in *Wolf* v. *Colorado, supra,* in refusing to hold the exclusionary remedy to be constitutionally required, remanded those whose rights had been infringed to "the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford." 338 U.S. at 31. The dissenters in *Wolf* warned that these alternative remedies were illusory. The experiment with other remedies, under the regime of *Wolf* v. *Colorado,* proved to be spectacularly unsuccessful. Thus, in *Mapp* v. *Ohio,* 367 U.S. 643 (1961) this Court observed that the other remedies had been "worthless and futile" and held that the remedy of exclusion was required by the interests embodied in the Fourth Amendment.

The effectiveness of the exclusionary rule does much to implement the Fourth Amendment's commands. But that remedy cannot be realized unless a criminal prosecution is ultimately undertaken against the victim of a Fourth Amendment intrusion. Conversely, the exclusionary rule is no guarantee of the rights of those who are not prosecuted. And it is of small value to those persons subjected to intentionally outrageous intrusions on their privacy, even though evidence may ultimately be suppressed and criminal prosecutions terminated. There are groups in our society who have been the victims of police harassment in such situations.[1]

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[1] Several months ago, following police raids of Black Panther offices in Chicago and Los Angeles, the American Civil Liberties Union surveyed police harassment in various metropolitan areas. ACLU affiliates reported persistent incidents of constitutional violations. At least one raid involved federal law enforcement officials. ACLU *News Release,* Dec. 24, 1969, PR 51-69.

This is hardly surprising since FBI Director Hoover has branded the Black Panthers the "most dangerous and violence prone of all extremist groups." *N.Y. Times,* July 14, 1970, p. 21, cols. 1-2.

Unless this Court can assure itself that there is no possibility that federal law enforcement officials will engage in violations of the Fourth Amendment for purposes of harassment or other motives unrelated to *bona fide* prosecution, there is a need for an effective remedy apart from the exclusionary sanction.

In all of those situations where the exclusionary remedy is no deterrent to or little satisfaction for a violation of Fourth Amendment rights, the other forms of redress are as unsatisfactory now as they were a decade ago when *Mapp* was decided. Criminal prosecution of offending officers, although authorized by 18 U.S.C. section 2236, is rarely invoked, as the annotations to that section testify. The use of 18 U.S.C. sec. 241 or 242 against federal officials is similarly unlikely.

As to the hortatory appeal to internal police discipline "under the eyes of an alert public opinion," this too seems an illusory recourse in this era of public concern for "law and order."

While injunctive, and presumably also declaratory relief, is theoretically available, see *Bell* v. *Hood, supra,* the target of an excessive violation of Fourth Amendment rights is hardly likely to be aware of the planned action before it is consummated. And rarely will such an individual be able to sufficiently demonstrate a pattern of official conduct to persuade a court to enjoin future invasions of his privacy.

The final remedy available to redress severe infringements of the Fourth Amendment by federal officers is a common law damage action. It was the supposed availability of this remedy which prompted the court below to

conclude that there was no need to allow damage actions in a federal forum. But constitutional rights should not be denied federal enforcement merely because the same conduct might give rise to common law liability. See Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109, 1118-22 (1969). Moreover, for reasons more fully set forth *infra,* part B, suits such as these have so many dimensions which are uniquely federal in nature, that they are best resolved by federal tribunals. Had the Fourth Amendment never been written, exclusive recourse to the traditional common law remedy of trespass actions might be understandable. But the Fourth Amendment was written and made an essential ingredient of our Constitution. It has long been used as a barrier to oppressive and overreaching conduct by federal law enforcement officials. The rights asserted herein are uniquely bottomed upon the spirit and language of that Amendment. When asserted against federal officers, there are compelling reasons to make a federal forum available for their vindication.

B. *The Federal Courts Are the Proper Forum for Litigation of This Type*

While the main issue in this case might seem self-contained, there is an important aspect of this case which was not considered by the Court of Appeals. That is that this action is cognizable in the federal courts irrespective of whether ~~the remedy~~ is afforded directly by the Fourth Amendment. The complaint properly alleges jurisdiction under 28 U.S.C., Section 1331(a), and properly states, as an issue necessary to be decided, the claim that a search was conducted without warrant in violation of constitutional rights. Plaintiff's right to relief, whether the cause of action is ultimately based on state trespass

law or directly on the Fourth Amendment, depends upon a pure issue—whether defendants violated the Fourth Amendment of federal law. Accordingly, whatever view this Court takes of the claim for a purely federal remedy, this action "arises under the Constitution . . . of the United States" as Section 1331(a) has been interpreted by this Court. See *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); H. Hart & H. Wechsler, *The Federal Courts and the Federal System*, pp. 763-69 (1953); *Wheeldin* v. *Wheeler*, 373 U.S. 647, 659 (1963) (opinion of Brennan, J.); Mishkin, *The Federal Question in the District Courts*, 53 Colum. L. Rev. 157, 166 (1953). Under *Smith*, whenever it appears from a complaint that the plaintiff's claim for relief, even if partially grounded on state law, depends also upon the construction or application of federal law so that a favorable construction or application is necessary for relief, jurisdiction exists under Section 1331(a). Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 268, 276-79 (1969). As a consequence, even if the courts below correctly denied the existence of a purely federal remedy, the dismissal was inappropriate. Rather, the question also had to be answered whether a sound claim of violation of the Fourth Amendment was stated and, if so, whether such a violation entitled the plaintiff to a damage remedy under the applicable state law of trespass or tort.

This point is significant for several reasons. It can be expected that most such claims will be brought in the district courts.[2] It needs little citation to establish that

[2] An additional ground for such cases to come into federal courts is 28 U.S.C. Section 1442, providing for removal by federal officers. Of course, this gives the federal defendant a choice of forums which the plaintiff does not have.

the availability of a federal forum of first instance is often considered crucial by counsel for parties complaining of deprivation of constitutional rights. Cf. *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966); *Georgia* v. *Rachel*, 384 U.S. 780 (1966). Accordingly, given the fact that the question of federal law controls plaintiff's right to relief, and that the defendants are federal officials, a state's interest would be minimal at best; and anticipating that most such cases will be tried and decided in federal courts, there seems little reason to let the incidents of such actions be *controlled* by state law.

These factors make the normal considerations of comity which ordinarily lead to caution in framing or expanding federal remedies for federal rights, see *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), irrelevant in this instance. Additionally, they make spurious the issue of whether a damage action *should* lie for federal officers' deprivation of constitutional rights. A damage action already lies in the law of trespass and tort and it lies in the federal courts for the reasons set forth above. The only serious issue is whether state law should be permitted to supply the standards for recovery and defenses to recovery.

Several reasons militate against the conclusion that state law should control the incidents of such actions where, as here, the state's interest is minimal. The first of these is that the power to define standards and defenses is actually the power to nullify the remedy. This Court has already concluded, in another context, that state remedial systems had rendered the Fourth Amendment a mere "form of words," *Wolf* v. *Colorado*, 338 U.S. 25, 42 (1949) (dissent). See *Mapp* v. *Ohio*, 367 U.S. 643 (1961); see also A. Hill, *Constitutional Remedies*, 69 Colum. L.

Rev. 1109, 1153 (1969). Thus, this Court should be hesitant to increase the power of the states to limit available remedies for Fourth Amendments rights by narrowing the bases for recovery in damage actions.

Secondly, it is only the conduct of federal officials which this action seeks to circumscribe. A purely federal remedy, arising from the Constitution itself, need not supplant or even supplement the already existing federal statutory remedy for deprivations by state officials. See 42 U.S.C. Section 1983. Moreover, no purpose is served by having the responsibilities of federal officers for violating the federal Constitution turn on the law of numerous jurisdictions which might apply widely differing rules as to standards and defenses.

Additionally, if this Court does declare a purely federal cause of action and undertakes to define all of the appropriate standards and defenses, it would be undertaking a task substantially similar to that performed by it in many other contexts. The Court of Appeals, in support of its position, argued that a federal court should not undertake to assume the "responsibility for developing a body of federal common law governing such questions as the types of damages recoverable, the types of injuries compensable, the extent to which official immunity is available as a defense, and the degree of evil intent which is necessary to state a meritorious cause of action" 409 F.2d at 726. That is exactly the task, however, which the federal courts have performed under 42 U.S.C. Section 1983, which provides nothing in the way of standards or defenses. See, *e.g., Pierson* v. *Ray,* 386 U.S. 547 (1967). Indeed, rules developed under that statute might provide an appropriate model. Moreover, in *West* v. *Cabell,* 153 U.S. 78

(1894), in which this Court sustained an action for damages as a consequence of a federal arrest violative of the Fourth Amendment, the applicable statute provided no help. It merely said that "in case of a breach of the conditions of a marshal's hand, any person thereby injured may institute in his own name and for his sole use suit on said hand and thereupon recover such damages as shall be legally assessed. . . ." Rev. Stats. Section 784 (1878). The statute was silent as to provisions of the hand, and provided nothing further about the circumstances under which one might recover damages for a marshal's misconduct. Nevertheless, this Court sustained the action and in so doing charged the federal courts with responsibility for developing appropriate rules. The process of declaring a federal common law is obviously not a new one for this Court, see, *e.g.*, cases collected in *Wheeldin* v. *Wheeler*, 373 U.S. 647, 664 n. 12 (1963), and one which this Court has in the past considered it appropriate to undertake despite the lack of constitutional necessity to do so. See, *e.g.*, *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). It is as appropriate in this case, in which the constitutional language forms the textual source, as it is when statutory language, not providing the remedy sought, is the source. See, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947). See also, A. Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118-1122 (1969).

Moreover, there is no question that this Court has the power to declare the existence of a constitutional remedy arising from the Fourth Amendment. Certainly, the holding in favor of jurisdiction in *Bell* v. *Hood*, 327 U.S. 678 (1946) implies such power. See also, *Swafford* v. *Temple-*

ton, 185 U.S. 487 (1902); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900). Cf. *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963). The Constitution has often been the direct source of remedies applied by this Court. See, *e.g., United States* v. *Lee,* 106 U.S. 196 (1882). As Professor Hill has recently pointed out, the declaration of a constitutional damage remedy is less disruptive of our constitutional scheme than other remedies because it does not have a necessary impact on the government, and therefore it is least violative of the sovereign immunity of the United States, Hill, *Constitutional Remedies, supra,* 1146-48. Accordingly, the position of the majority of the Court of Appeals that the federal courts should not establish constitutional remedies because Congress has not acted to implement a particular provision of the Constitution ignores the role of the courts in giving meaning and effect to constitutional language.

The ACLU believes that the sanction of personal financial responsibility is of prime importance in protecting individuals against excessive use of federal authority. For the reasons above, this Court should hold that the Fourth Amendment itself provides that, in appropriate cases such as this, its breach must be redressed by damages.

II.

No doctrine of official immunity supports the dismissal of the complaint in this action.

The American Civil Liberties Union is committed to the view that personal accountability of government officials, in the form of damage actions, as well as criminal responsibility, is one of the most valuable tools which society possesses to limit overzealous government officials' infringement of personal liberties. For that reason, the ACLU believes that the majority position in *Barr* v. *Matteo*, 360 U.S. 564 (1959), declaring an absolute privilege for government officials, acting within the scope of office, should be reconsidered and the Court should adopt the kind of qualified privilege rule urged by the dissents of Chief Justice Warren and Mr. Justice Brennan in that case. A qualified privilege, involving good faith belief by the government official that his action is consistent with his office and the United States Constitution, is harmonious both with the principle of personal accountability and with the broadest justifiable freedom of action for government officers. Conversely, the absolute privilege does not balance personal responsibility against governmental freedom, but simply relegates the former to irrelevancy in the most important instances. See *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). As such, the rule of *Barr* v. *Matteo* deviates seriously from settled principles of accountability. See, *e.g.*, *Wheeldin* v. *Wheeler*, *supra*, at 656 and cases cited.

Moreover, when dealing with the kinds of official misconduct alleged here, the federal courts have not applied the absolute privilege approach of *Barr* v. *Matteo* when

the defendants are state officers. In cases of this type brought under the Civil Rights Act, state law enforcement officers enjoy no absolute freedom from liability, but rather are subject to suit, although they may assert a defense based on good faith *and* probable cause. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Joseph* v. *Rowlen*, 402 F.2d 367 (7th Cir. 1968).

Similarly, many federal courts have allowed only a qualified privilege in suits such as this, which complain of conduct by federal officials in violation of the Fourth Amendment. Thus, for example, in *Hughes* v. *Johnson*, 305 F.2d 67 (9th Cir. 1962), a suit against federal game wardens, the court discussed *Barr* v. *Matteo*, observing:

> Our problem at this point does not relate to the malicious performance of official duties. The question is whether a search without warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view, it cannot and accordingly immunity does not extend to such conduct. 305 F.2d at 70.

Accord, Allen v. *Merovka*, 382 F.2d 589 (10th Cir. 1967). Similarly, in *Kelley* v. *Dunne*, 344 F.2d 129 (1st Cir. 1965), Chief Judge Aldrich, after a careful analysis of the policies involved in determining an appropriate immunity rule in cases such as this, distinguished *Barr* as follows:

> Applying these principles to the cases at bar there would seem a substantial difference between a public information officer uttering a defamatory statement in the course of an official announcement, for example,

> and a postal inspector making a search without, so far as presently appears, consent or a warrant or belief that there was a warrant, and volunteering slander. The public need to protect such conduct, or conduct difficult to separate therefrom, is minimal. 344 F.2d at 133.

The court saw no reason to accord federal law enforcement officials an immunity which state officials would not have.

Cases such as these reflect the implicit realization that there are really two issues involved in the immunity question: first, when should a suit be allowed against a governmental official, and, second, what defenses should be available. The analysis in *Barr* v. *Matteo* is apposite only to the first issue and represented a concern for insulating policy-making officials from vexatious lawsuits which, in the aggregate, might inhibit fearless planning of the public business. No such countervailing interest is involved in protecting the kind of patently unconstitutional conduct alleged here, so similar to that alleged in *Monroe* v. *Pape*. Consequently there should be no immunity from suit. See, *Kelley* v. *Dunne, supra; Hughes* v. *Johnson, supra.* As to the second issue, in suits challenging violations of the Fourth Amendment, the mode of analysis should be drawn from *Monroe* and *Pierson*. In *Pierson*, the Court observed that the traditional common-law rule of tort liability afforded police officers the defense of "good faith and probable cause" when sued for false arrest or imprisonment. 386 U.S. at 555-57. That same qualified privilege was held available in suits brought under the Civil Rights Act. Moreover, when an arrest is made without a warrant and without probable cause, good faith is irrelevant. See *Joseph* v. *Rowlan, supra.*

Amicus submits that the same standard should be applied to the conduct of federal law enforcement officials. No principle of federalism requires that federal officers in federal courts should be granted greater protection. Indeed, for the reasons set forth in part IB *supra*, and because the prohibitory commands of the Fourth Amendment operate directly on federal officials, it would be anomalous to afford a federal policeman greater freedom from liability for the same conduct which would render state officials liable in damages.

Even more pertinent to the present case, however, is the fact that in the procedural context of this case the immunity issue cannot be reached. The complaint attempts to plead unconstitutional action by the defendant agents in excess of their authority. The motion for summary judgment neither adds nor subtracts anything. There are no other pleadings or affidavits in the record. It is established principle under *Barr* v. *Matteo*, *supra*, that the doctrine of immunity comes into play only at the instance of a government official who acted within the scope of his authority. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) (majority opinion). The complaint pleads no facts from which action within lawful authority could be found, unless "scope of authority" included everything but purely personal gambits. That is so even if, under some circumstances, a government official can act in violation of the Constitution and still be within the scope of his office.

The federal courts have been extremely reluctant to afford immunity without a detailed showing, by affidavit or otherwise, that the defendants' conduct was within the scope of his official duties. See, *e.g.*, *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *Chafin* v. *Pratt*, 358 F.2d 349 (5th Cir.), *cert.*

denied, 385 U.S. 878 (1966); *Scherer* v. *Brennan*, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967). Requiring some demonstration of authority will hardly deter law enforcement officials from performing their legitimate responsibilities. And it will insure that redress will be available where as here authority has been unconstitutionally exceeded.

Therefore, if this Court decides to reverse on the first question, there is no basis on which it could find for respondents on the second. Rather, it should remand the entire case. Hopefully, the Court will remand with instructions to consider the applicability of a limited, rather than absolute, immunity rule, and to require some showing by the defendants to support such an immunity.

CONCLUSION

The decision of the Court of Appeals should be reversed and the judgment of dismissal vacated, and this case should be remanded to the district court for further proceedings.

Respectfully submitted,

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